

PRELIMINARY STAFF DRAFT 12/21/2011
FOR DISCUSSION PURPOSES ONLY

BDCP is starting to release pre-administrative drafts of various chapters of the BDCP EIR/S. The Delta Reform Act designates the Council as a responsible agency for the EIR/S. As such, the Council will need/want to provide comments on the administrative draft, public review draft, and final EIR/S, as appropriate.

The Delta Reform Act requires the Delta Independent Science Board to review the public review draft EIR/S and provide its comments to the Council and DFG. The following is an outline of a suggested approach to fulfill these respective requirements in a coordinated manner, that can be used to develop one or more task orders with the Council's independent consultant advising on BDCP.

1. Council (as responsible agency).

- Per CEQA rules, Council may submit comments on draft EIR regarding those activities involved in BDCP that are within an area of the Council's expertise, that are required to be carried out or approved by the Council, or that are otherwise germane to the Council's statutory responsibility. The Council's primary statutory responsibility visavis BDCP, aside from its role as a responsible agency, is to serve as an appellate body regarding DFG's determination that the BDCP has met the requirements of WC sec. 85320 for purposes of inclusion in the Delta Plan and eligibility for state funding for public benefits. Consequently, as discussed below, the nature and structure of the Council's EIR comments should track, for the most part, the nature and structure of that potential appellate decision.
- Because the WC sec. 85320(b)(1) requires the Council, on appeal, to find that the BDCP "complies" with the NCCPA (for purposes of inclusion in the Delta Plan, and per Council rules, after giving weight to the reasoning and factual findings of DFG), the Council may make comments regarding the adequacy of the BDCP under the NCCPA, as analyzed in the EIR, for these purposes.
- Because WC sec. 85320(b)(2), requires Council, on appeal, to find that the BDCP EIR "complies" with CEQA (for purposes of inclusion in the Delta Plan, and per Council rules, after giving weight to the reasoning and factual findings of DFG), the Council may make general comments regarding the adequacy of the draft and final EIR under CEQA; however, comments must be supported by specific documentation, and should focus on shortcomings in the EIR or on additional alternatives or mitigation measures that the EIR should include that would reduce or avoid any identified significant effects (with accompanying performance objectives or appropriate guidelines or reference documents)

- Because WC secs. 85320(b)(2)(A)-(G) further require that the BDCP EIR include specified analyses as part of its CEQA compliance, the Council’s comments should focus on (but not necessarily be limited to) the adequacy of those specified analyses. In particular, whether the EIR includes a “comprehensive review and analysis” of :
 - a. a reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval under NCCPA, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
 - b. a reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design option of a lined canal, an unlined canal, and pipelines.
 - c. the potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the EIR.
 - d. the potential effects on migratory fish and aquatic resources.
 - e. the potential effects on Sacramento and San Joaquin River flood management.
 - f. the resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.
 - g. the potential effects of each Delta conveyance alternative on Delta water quality.

2. Independent Science Board.

- WC sec. 85320(c) requires the Board to review the draft EIR and submit comments to the Council and DFG (ie, not as a responsible agency to DWR).
- WC sec. 85280(a)(3) requires the Board, generally, to provide oversight of scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs at least once every four years.
- Consequently--although the Board’s role is not limited by a “responsible agency” designation as is the Council’s -- Board comments on environmental analysis or shortcomings in the EIR with a nexus to adaptive management would clearly be germane to the Board’s general statutory responsibility.
- In addition, because the Board is required to submit comments to the Council (and not DWR), its comments—if the duration of the public comment period permits--should inform the Council’s comments on the draft and final EIR as a responsible agency. In this regard, the Board should provide a science-based assessment, which

supplements technical analysis from the independent consultant and legal analysis from counsel, which together forms the basis of the Council's comments. At a minimum, Board comments would appear especially relevant to the scientific underpinnings of the Council's comments on a, c, d, and g above.